No. 20,508

United States Court of Appeals

For the Ninth Circuit

[ASTER TRANSMISSION REBUILDING CORPORATION & MASTER PARTS, INC.,
Petitioner,

vs.

[ATIONAL LABOR RELATIONS BOARD,
Respondent.

[n Petition to Review, and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

PETITIONER'S REPLY BRIEF

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ARGUMENT

The Respondent, National Labor Relations Board, in its counterstatement of the case, in general states the facts as found in the record. However, its conclusions and opinions contained therein are erroneous, as will be hereinafter discussed.

I.

THE SUBSTANTIAL EVIDENCE AND THE WHOLE RECORD DOES NOT SUPPORT THE FINDINGS OF THE BOARD THAT THE COMPANY INTERFERED WITH AND RESTRAINED AND COERCED ITS EMPLOYEES IN VIOLATION OF THEIR STATUTORY RIGHTS GUARANTEED BY SECTION 7 OF THE ACT, OR PROHIBITED BY SECTION 8(a)(1) OF THE ACT.

The Respondent argues that the interrogation of employees Chevoya and Napier, on or about January

27, 1964, by Supervisors Lawley and McGuinigie constituted a violation of the Act because these employees were accused of being "ring leaders" and that they were admonished that President Rowland would move the plant rather than allow it to be organized. Careful reading of the testimony and records shows that Mr. McGuinigie, a supervisor without any labor relations authority, made a "facetious" remark that Mr. Rowland could buy a desert island and move his plant there. (Tr. 157:1-8.)

Such conduct does not violate Section 8(a)(1) and is privileged as a right of free speech under Section 8(c).[1] It is a mere expression of opinion, not authorized, ratified or supported in any way by other facts or evidence.

To show that such a statement violates Section 8(a)(1), the interrogation, to be violative, must interfere with, restrain or coerce the employees in the exercise of their rights under Section 7. No such evidence appears in the record. We submit that it is "too thin a crust" for the Board to rely upon in making its order to bargain (*NLRB v. Dan River Mills Inc.,* 274 F. 2d 381.)

Insofar as Mr. Chevoya being asked if he was a ring leader, unless such statement is coupled with

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[1] "(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

promises of benefit or threats of reprisal, it does not violate the Act.

NLRB v. Council Manufacturing Corp., 344 F. 2d 161;

NLRB v. Trumbull Asphalt, 327 F. 2d 841, 844;

Beaver Valley Canning Co. v. NLRB, 332 F. 2d 429, 433.

Although Mr. Rowland did not know of these conversations on February 7th, he did refute same when he told the employees they could vote for or against and he would not engage in any reprisal.

The Respondent again argues, contrary to the Trial Examiner's findings, that the interrogation by Mr. Rowland of employees Anderson and Chevoya on or about February 7, 1964 violated Section 8(a)(1) of the Act. Mr. Chevoya came into the office and asked to talk to Mr. Rowland in regard to the tardiness notice which had been posted. The conversation as related by Mr. Chevoya clearly shows that there was no restraint, coercion or interference in this conversation. He was told by Mr. Rowland to vote for the Union if he thought this was in his best interests, and to do what was best for him and his family. (TR 197:4-18; 198:3-7; 416:8-11.) The Trial Examiner found, after considering all the evidence, that there was no coercion or discrimination in posting the tardiness notice. (TXD p. 10, par. 10.)

The Board, in reversing the Trial Examiner, concluded that the tardiness notice was intended to serve as a reprisal against employees for engaging in union

activities. (R. 51:1.) The Respondent argues that the Company had "condoned this practice for years." The evidence does not support this conclusion. The tardiness notice had been posted on previous occasions.

Insofar as the interview with employee Anderson, in changing his wage rate to conform to the Fair Labor Standards Act, the Trial Examiner found absolutely no evidence that this interrogation was coercive. He found that "Mr. Rowland was the more reliable witness". (TXD 9:50; 11:55-60; TR 12:55.)

On February 5, five employees (Manuel B. Viayno, Gene M. Eagles, Harold Anderson, Dave Williams and Fay Hill) who signed authorization cards changed their minds and signed the anti-Union petition. Not one of these employees testified that he signed the petition because of any conduct of the Employer. At the hearing, General Counsel never asked them why they signed the petition. All the evidence in the record shows that cause of the employee defection was the vigorous campaigning of a group of employees led by Wilson and Nuzzolese, without the knowledge of the Employer.

The evidence shows and the record shows that the petition was signed by employees exercising their rights guaranteed by Section 7 of the Act, free from Employer restraint, coercion or interference.

These employees did, in fact, voluntarily withdraw their majority support from the Union. How can the Employer be found guilty of illegally coercing them into doing what they had already legally done? The change of mind of employees can destroy a union's

majority. (*Fort Smith Broadcasting v. NLRB,* 341 F. 2d 874, 881.)

II.

THE SUBSTANTIAL EVIDENCE AS A WHOLE DOES NOT SUPPORT THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) OF THE ACT IN REDUCING WORKING HOURS ON FEBRUARY 5, 1964.

The Respondent argues that Rowland told the employees on February 5 that if they wanted Union conditions, he would give them a Union work week and reduce their hours of employment by 6½ hours per week. The uncontroverted testimony of all witnesses showed that the "core pile" was low, that the employees were engaged in a make-work program, that there was not enough work for the employees to perform, and that there was valid economic justification for the reduction in hours. (TR 7:10.) He stated on February 5 that he was going to eliminate the Saturday overtime constituting a loss of 4 hours a week and was going to extend the lunch period from ½ hour to one hour. He did, nevertheless, upon advice of counsel, restore the 4-hour Saturday overtime when he made his talk to the employees on February 7. He further explained to the employees at this time that they had a right to vote as they pleased, and that he would not discriminate against any employee because of Union activity. In weighing the evidence, the Trial Examiner found this to be an adequate retraction. The effect, if any, of this threatened reduction in overtime was completely dissipated and did not inter-

fere with, restrain or coerce these employees in the exercise of their rights under Section 7 or in the exercise of their right to cast an uncoerced ballot at the election which was held on February 24, 1964. The Trial Examiner found that the Employer left the 1-hour lunch period in effect for purely economic reasons. (TXD 13:5-10, 15-20; 15:55.)

The Board finds that this reduction of overtime was a violation of Section 8(a)(3) of the Act, again reversing the Trial Examiner. As set forth in Petitioner's original Brief, this Employer, in the final amended complaint, was never charged with an 8(a)(3) violation. The Respondent argues and relies upon *NLRB v. Fant Milling Co.,* 360 U.S. 301, 307, in upholding its right to add the 8(a)(3) unfair labor practice to the unfair labor practices already filed. (Resp. Brief p. 14.) The facts in *NLRB v. Fant Milling Co.,* supra, can be differentiated. In that case, the employer continued to engage in unfair labor practices after the unfair labor practice charge was filed, and the Board based part of its decision on the subsequent conduct. In the present case, the final and third amended charge was filed July 15, 1964, alleging the Employer's conduct in January and February as the basis for the charge.

The previous charges, filed March 2, 1964 and June 1, 1964, alleged the 8(a)(3) violation; however, after investigation, the third amended charge eliminated this 8(a)(3) allegation. No conduct of the Employer as alleged was found to exist after February 7, 1964 as it would relate to this case. If the Union and the

National Labor Relations Board are to permit the deletion of an unfair labor practice charge by amendment, based upon preexisting facts or conduct, the Board's decision should not go beyond the scope of the unfair labor practice charge. Thus, the 8(a)(3) violation as found by the Board should be dismissed.

III.

THE BOARD REVERSED THE TRIAL EXAMINER AND, CONTRARY TO THE SUBSTANTIAL EVIDENCE, FOUND THAT THE PETITIONER VIOLATED 8(a)(2) OF THE ACT.

The day after the National Labor Relations Board held the election, President Rowland called a meeting of the employees and thanked them for their vote against the Union and suggested that a committee be formed to discuss problems affecting production, but clearly said that the committee was not to discuss wages or working conditions, or was it to be considered a labor organization. (TR 411:16-19; 412:20-22.) Since this activity was "post election" conduct, it could have no effect in restraining, coercing or interfering with the election as such, insofar as an 8(a)(1) violation is concerned. Insofar as an 8(a)(2) violation, the Trial Examiner found that the committee was not a labor organization. (TXD 14:25-55.)

The Respondent argues that the Employer encouraged the formation of and agreed to finance the committee! This is contrary to the evidence.

The Respondent states (on page 15 of their Brief): "Employees were to channel their individual griev-

ances through this committee, whose financial stability was assured by Rowland's donation of the proceeds of various vending machines in the plant." The clear, uncontroverted evidence shows that the proceeds of the various vending machines were given to the employees for the sole purpose of holding their annual picnic or "beer bust" at Millerton Lake. (TR 413:15, 16.) There is no evidence that the moneys from these machines were to be used to finance the committee in any way. It is a finding not supported by evidence. The Respondent argues that the committee effectively dealt with the Company in such matters as "lighting" for the plant, and providing for repair of employee tools at Company expense. There is nothing in the Act that prohibits an employee from talking to his employer regarding such activity, whether or not he has a union representative or a collective bargaining agreement.

IV.

THE SUBSTANTIAL EVIDENCE AS A WHOLE SUPPORTS THE TRIAL EXAMINER IN HIS DECISION IN FINDING THAT THE COMPANY DID NOT VIOLATE SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION ON REQUEST.

The Board, in its Decision and Order, found the Employer guilty of refusal to bargain. In doing so, it completely reversed the Trial Examiner and ignored the real issue in this case. The Trial Examiner, at the close of the hearing, when the testimony and evidence was fresh in his mind, stated:

". . . I know you are all, you all view this case in the light of the Bernel Case, and of similar nature, for there are things which occur to me in that connection which I am somewhat concerned about.

"Now, what is the effect of filing three different majorities at different times? I have got a statement here filed by opponents of the union with names on, a petition which was circulated. You have got the tally of ballots in an election, and you have got the union cards.

"Does that give the cases a different twist? I don't know.

"Then there are these other items, and one of them I am thinking of, too, that I don't know what it might be, but here you have a group of individuals who do not want the union, as I recollect, it, there was no testimony here or any evidence which would make them any agent of the employer, or of individuals doing any bidding of his, and they were acting independently under the leadership of this young man [Wilson] who testified, who seems to be very strongly opposed to the union.

"Now, the question I ask you is this. Supposing the employer is found to have committed certain unfair labor practices, does it follow from that that all of these employees shall have as their representative the union here involved?" (RT 517, 518.)

After briefs were filed by the parties, the Trial Examiner's ruling ruled that there was no 8(a)(5) violation. We believe the Board has completely

ignored the rights of the employees under Section 7 of the Act. The Union obtained 15 authorization cards from 20 employees during the month of January 1964. It is settled law that if a union represents a majority of the employees on the date that it requests recognition, there is imposed on the employer a duty to bargain, unless the employer has a good faith doubt of the union's majority status. The duty to bargain is not imposed until the employer actually receives the request. In this case, the Employer was notified of the Union's majority status on February 5 and on the same date received a petition for election which had been filed February 4 by the Union. The Board, in its decision, found that the Employer was motivated by a desire to gain time in which to undermine the Union's majority status (R. 55) by its failure to respond to the Union's request for bargaining. This conclusion is completely contrary to the findings of the Trial Examiner who held that this was not the conduct of an employer who desired to gain time to undermine the Union's majority. (TXD 13:45; 12:35.) The Employer's counsel immediately, on February 6, wrote to the Union, stating that the Employer would consent to the election. On February 7, the employees were told that the Employer would consent to an election and that they had a right to vote for or against the Union, without Employer interference.

The real crux of this case is the fact that a majority of the employees themselves repudiated the Union on February 5. The anti-Union petition which was signed by 12 employees on February 5 out of a unit of 18

employees clearly shows that the Union had lost its majority on that date. The Trial Examiner found that the cause of this employee defection was the "independent intervening acts of a group of anti-Union employees led by employees Wilson and Nuzzolese." (TXD 6:10; 14:5.) He found that the defection from the Union was *not* caused by Mr. Rowland's speech of February 5. (TXD 14:5.) He found that it was the "vigorous anti-Union campaign" of these employees that caused the loss of the Union's majority. (TXD 14:5.) The Board states in its decision and the Respondent argues on brief that ". . . the Union had achieved its majority status notwithstanding the conduct of these employees." It was not until the Company President intervened on February 5 that pro-Union employees began to defect. (Resp. Brief p. 20.) This statement and conclusion is completely unsupported by the evidence. The evidence shows that the Union achieved its majority status on or about January 27. The anti-Union petition is dated February 5, 1964 and all signatures were obtained on that date, so it is obvious that the Union did not achieve its majority status *notwithstanding the conduct of these employees,* but that the Union lost its majority status because of the vigorous conduct of these employees. The Respondent would have this Court believe that it was the speech of the Company's President that caused these employees to defect. There is not one bit of evidence to show but what the anti-Union petition was signed before Mr. Rowland made the speech in the afternoon of February 5 and, as previously stated, the Trial Examiner found that it was not Mr. Row-

land's speech that caused the employees to sign this petition. The Trial Examiner stated:

> "While the General Counsel may argue that this lack of majority was caused by the speech of Rowland on February 5, and the prior interrogations, that argument does not give due consideration to the vigorous anti-union campaign of Wilson and Nuzzolese which was an independent, intervening cause of the election results." (TXD 14:1-5.)

Even if the Employer had refused to bargain on February 5, as found by the Board, he had no duty to do so because of his good faith doubt of the Union's majority status.

The Board, in *Palmer Asbestos & Rubber Co. v. NLRB,* 63 LRRM, at 1056, stated:

> "A showing of good faith doubt . . . requires more than the employer's mere assertion of it and more than proof of the employer's subjective state of mind. The assertion must be supported by *objective* considerations. The applicable test as defined by the *Celanese* case, 95 NLRB 664, 672, is whether or not objective facts furnish a reasonable basis for asserting doubt, or put it another way, whether or not there is some 'reasonable ground' for believing the union has lost its majority status. . . ."

If a "good faith doubt" is to be considered by objective facts, they certainly exist in this case, to wit:

1. The extrinsic evidence shows that a majority of the employees withdrew their support when they executed the anti-Union petition on February 5.

2. The conduct of the Employer in consenting to an election immediately would be an inference that he did not believe the Union had a majority status.

3. Company supervisors advised Mr. Rowland on February 5 that the employees were "split down the middle."

4. Witnesses testified that some of the employees who had previously signed cards were "strictly on the fence," and wanted to be with the majority. (TR 194, 242.)

5. General Counsel's witness Chevoya testified that they were split down the middle and there was much turmoil between the factions.

6. The fact that the Company did not engage in any campaign against Union organization after the meeting of February 7, 1964.

7. The fact that the Union did not offer to prove its majority or further request bargaining.

The only statement by anyone in the entire record which would indicate that the Employer had any knowledge of the majority status of the Union was allegedly made by Mr. Chevoya to Mr. Rowland on February 7, at which time he is purported to have said that 90% of the employees had signed authorization cards. This statement, of course, would have absolutely no effect if the employees had already withdrawn their support two days before, on February 5. Mr. Chevoya did not testify that he made such a statement.

We believe the record evidence and extrinsic evidence clearly support the Employer's "good faith

doubt", if he should be required to have one. However, since the majority of the employees had already repudiated the Union as of this date, there could be imposed no duty to bargain on or after February 5, 1964.

The Respondent cites *NLRB v. Security Plating Company,* a decision by this Court, 356 F. 2d at 727, in support of its holding that the Union does not need to offer to prove its majority status. The facts here differ. In *Security Plating Co.,* supra, the employer polled his employees and they voted for a union. He immediately thereafter made a coercive speech and polled them again and obtained a different result. It appears only logical that if the Union files a petition for an election, it should thereafter request bargaining if it desires bargaining after it has filed a petition for election, and this was not done. We submit that the Trial Examiner, in his decision, finding that there were no violations of 8(a)(5) was completely supported by the evidence and his findings of credibility should be upheld under the rules set down by *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474.

V.

THE BOARD'S ORDER TO BARGAIN IS INVALID AND IMPROPER.

Respondent argues that the "Board is entitled to compel an employer to bargain with a union in order to remedy the conduct involved here, even where the union has subsequently lost its majority status because of the Employer's unfair labor practices."

Under *Bernel Foam Products Co.,* 146 NLRB 1277, the Board reversed its former *Aiello Dairy Farms* doctrine, 110 NLRB 1365, and concluded that the Board did have a right to set aside an election and make its order requiring the employer to bargain with the union upon request. All of the cases cited at page 24 of Respondent's Brief were cases in which the employer had either refused to bargain with the union after the union had offered to present authorization cards to prove its majority, or had checked authorization cards and refused to bargain, or the employer had himself filed a petition for election and refused to bargain with the union to obtain a delay, facts not present here.

In applying the *Bernel Foam* doctrine, the Board must ascertain that the loss of majority status was the result of the Employer's unfair labor practices, but here we have strong, convincing evidence to support the fact that the loss of majority was occasioned by the "independent intervening acts" of a group of anti-Union employees.

Real danger is ever present when the Board applies its *Bernel Foam* doctrine, in that it may be forcing an unwanted union upon the uncoerced majority of the employees in the bargaining unit. Section 7 of the Act provides:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and

shall also have the right to refrain from any or all of such activities . . ." (Emphasis added.)

This section protects the majority of the employees' rights to *refrain* from union activity as well as it protects the rights of the employees to *engage* in union activity.

The substantial evidence here shows that the majority of the employees withdrew adherence to the Union some time on February 5. The Trial Examiner found that the Union did not represent a majority after February 4 (TXD 13:50-60), and found that this loss of majority status was not occasioned by any of the Employer's unfair labor practices, thus an order to bargain is a clear violation of the rights guaranteed the employees under Section 7. The Board is doing here what the employer is prohibited from doing, i.e., it is restraining, coercing and interfering with employees in the exercise of their rights guaranteed under Section 7. The Board's order to bargain imposes a collective bargaining representative upon the employees, when the majority had clearly indicated they did not want the Union. The tally of ballots at the election (TXD 8:35-45) showed that 12 employees voted against the Union, the identical number found on the anti-Union petition—apparently there was no change between February 5 and February 24, a fact ignored by the Board in its Brief.

The Trial Examiner recommended that the Board's remedy in this case should be the directing of a new election at some later time when the effects of the

Employer's unfair labor practice had been dissipated. The Respondent argues that ". . . in a majority of the cases another election can hardly be said to be an adequate remedy for the employer's unlawful refusal to recognize the employees' designated majority representative which was followed by conduct which interfered with the employees' freedom of choice"; Respondent cites Pollitt, *"NLRB Re-Run Elections: A Study"*, 41 N. Car. L.Rev. 209-224, wherein

> "On the basis of an analysis of 212 'employer caused' re-run elections conducted under Labor Board supervision during a recent 33-month interval, the author concluded that the objecting union only won 30 percent of such re-run elections (id. at 212). By contract, unions generally win about 60 percent of the Board's elections. Twenty-Eighth Annual Report, NLRB, p. 18 (G.P.O. 1964)."

The Respondent argues further: "On the contrary, experience has demonstrated that a vast majority of the re-run elections' results favor the party which interfered with the original election." We believe that the results of this Study are the opposite. This Study shows that 70% of the *re-run* elections result in a majority vote against the Union. This indicates that in 70% of the cases, where employees have voted against the union in the first election, they will vote against the union in the second election. If we did follow this logic, the application of the *Bernel Foam* doctrine would result in the Board's requiring the Employer to bargain for his employees where, if the employees were given their free, uncoerced choice,

70% of the time they would have chosen not to be represented by a union.

The Board, in its recent decisions, has been ignoring the fact that employees are generally intelligent human beings, not easily swayed by isolated statements made by an employer or a union, and that an employee, knowing that he can cast a secret ballot with nobody knowing how he voted, will cast same according to the dictates of his own conscience. This is the very reason that Congress provided for the election procedure in Section 9 of the Act.

As stated in Petitioner's original Brief, we do not believe there should have been a retrospective application of *Bernel Foam,* as this Employer and his counsel, when the Union filed a petition for election, relied upon this petition, knowing that the Union had elected its method of determining its representative status (under *Aiello*). To avoid any possibility of being accused of delaying to undermine the majority status of the Union, the Employer immediately consented to the election and engaged in no acts whatsoever of campaigning against the Union, on or after February 7, 1964. As the record shows, there was complete freedom of Employer activity between February 7 and February 24, the date of the election. (See TXD 13:25.)

The Respondent further argues that the bargaining order should be sustained, *"even if there is a defense to the Section 8(a)(5) violation"*. This argument is premised upon the fact that the Board found that the Union's loss of actual majority status was attributable

to the Employer's unfair labor practices and accordingly, the Board concluded that the "effectuation of the policies and purposes of the Act required the issuance of a bargaining order herein even if there were no unlawful refusal to bargain". (RB 32, 33.) However, the Board's conclusion that the Petitioner's legal interference with its employees' rights did cause the Union's loss of majority status is not supported by the evidence, as previously set forth.

It appears that the National Labor Relations Board, in its recent decisions, has made its order to bargain against an employer as a penalty for his engaging in unfair labor practices and is forcing and requiring the employer to recognize the union on the basis of authorization cards signed and obtained by the union prior to his engaging in any unfair labor practices. This concept ignores completely the rights of individual employees.

CONCLUSION

As stated in *Universal Camera,* supra, and *NLRB v. Latex Industries,* 307 F. 2d 737, 738 (51 LRRM 2101), the Trial Examiner's decision is entitled to considerable weight, where the issue turns on credibility of witnesses whom the Trial Examiner alone heard and saw.

The Trial Examiner found in this case that Rowland was the most credible witness in his testimony about the interviews with Anderson and Chevoya and found no 8(a)(1) violation resulted.

He found the Company did not engage in delaying tactics to undermine the Union's majority.

He found the Union's majority loss was not caused by the Employer's unfair labor practices and credited the testimony of employee Wilson in this regard.

He found that Mr. Rowland's speech of February 5 did not cause the Union's loss of majority.

He credited Mr. Rowland and found that he did not threaten to move the plant. He found that Mr. Rowland did not post the tardiness notice in reprisal for Union activity. He found the employee committee was not a labor organization and that Mr. Rowland did not finance said committee activities.

The Board argues in Respondent's Brief that it was not reversing the Trial Examiner's findings of fact, but instead reversed his conclusions and application of law.

The record and evidence is clear that the Board did more than draw contrary inferences from the facts—it changed the factual findings as credited by the Trial Examiner who is experienced in the field and "who lived with the case". It is the duty of the Trial Examiner to weigh the evidence and assure the trustworthiness of the evidence and only he could observe the demeanor, bias, attitude and prejudice of witnesses. The support for the Board's decision and order is considerably weakened, since the Board drew conclusions far different from those of the Trial Examiner.

The U. S. Supreme Court, in *Universal Camera v. NLRB,* 340 US 474, 490, directed the courts of appeal to assume responsibility for the "reasonableness and fairness" of the Board's decisions and said that Congress had imposed upon the courts of appeal the "responsibility for assuring that the Board keeps within reasonable grounds."

We submit that consideration of the evidence on the record considered as a whole shows that the Board, in overruling its Trial Examiner, exceeded reasonable grounds and reached an unreasonable and unfair decision, not only to the Employer but to the employees. The Court, in *Universal Camera,* supra, at page 476, said:

> ". . . evidence supporting a conclusion may be less substantial when an impartial experienced examiner who has observed the witnesses and lived with the case has drawn conclusions differ-

ent from the Board's than when he has reached the same conclusion."

Under the Trial Examiner's decision, the interrogation of Chevoya and Napier by Lawley and McGuinigie on or about January 24, and the February 5 speech of Mr. Rowland were found to be in violation of the Act.

Since the interrogation of Napier and Chevoya on January 24 took place prior to the Union filing an election petition, under the Board's rules this could not be used as a basis for setting aside the election. (*NLRB v. Goodyear Tire & Rubber Co.,* 138 NLRB 59; 51 LRRM 1071.)

Any coercive effect in Mr. Rowland's speech of the 5th was found by the Trial Examiner to have been effectively retracted on February 7. This was 17 days before the election, with absolutely no further campaigning by the Employer, and insufficient justification for the Board to set aside the election results, let alone to find him guilty of unfair labor practices.

The Board's obligation is to effectuate the purposes of the Act and primarily to protect the rights of employees, seeing that they are free to join unions *if they wish,* and not by requiring them to join contrary to their statutory, guaranteed rights. Here, the application of *Bernel Foam* rules and the Board's order to bargain violates the rights of employees under the Act.

We respectfully submit that the Board's order here is not supported by the substantial evidence on the

record considered as a whole, and should be set aside and the cross-petition for enforcement denied.

Dated, Fresno, California,
October 5, 1966.

Respectfully submitted,
DOTY, QUINLAN & KERSHAW,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and in my opinion, the foregoing brief is in full compliance with those rules.

PAUL K. DOTY,
Attorney.